INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	4
Summary of Argument	9
Argument	12
I. The trial court's charge under 21 U.S.C. 174 that the jury was entitled to convict upon a finding of unexplained possession of the heroin did not violate the requirements of due process	14
A. It was rational for the jury to conclude from petitioner's possession of two hundred seventy-five bags of heroin that the heroin was illegally imported into the United States and that petitioner had knowledge of its illegal importation	14
1. Heroin is neither produced in nor legally imported into the United States	17
2. Since all heroin is illegally imported, it is rational to permit a jury to infer that a person in possession of two hundred seventy-five bags of heroin knows it was illegally imported	25
B. Petitioner's conviction on count three, based upon his possession of a small amount of cocaine hydrochloride, should be reversed because it cannot fairly be sustained under the rational connection test	28

382-688—69——1

Argument—Continued
II. As applied to petitioner, the statutory presumption contained in 26 U.S.C. 4704(a) complied with the requirements of due process ..... Page 32
III. Neither statutory presumption violates the Privilege against self-incrimination 34
A. The rational application of the presumptions in this case did not impermissibly fetter petitioner's choice as to whether to testify 35
B. The trial court's instructions concerning the presumptions did not constitute adverse comment on petitioner's failure to testify or impermissibly abridge his right to remain silent 39
Conclusion 43
Appendix 44

CITATIONS

Cases:

Az Din v. *United States*, 232 F. 2d 283, certiorari denied, 352 U.S. 827 22
Bellard v. *United States*, 356 F. 2d 437, certiorari denied, 385 U.S. 856 42
Beufve v. *United States*, 374 F. 2d 123 26
Brown v. *United States*, 370 F. 2d 874, certiorari denied, 386 U.S. 1039 42
Bruno v. *United States*, 308 U.S. 287 ..... 40, 42
Casey v. *United States*, 276 U.S. 413 ..... 13, 27, 34
Erwing v. *United States*, 323 F. 2d 674 29
Gardner v. *Broderick*, 392 U.S. 273 39
Garrity v. *New Jersey*, 385 U.S. 493 38
Gore v. *United States*, 357 U.S. 386 18
Griffin v. *California*, 380 U.S. 609 ..... 41, 42
Grosso v. *United States*, 390 U.S. 62 38
Hanks v. *United States*, 388 F. 2d 171 42
Harris v. *United States*, 359 U.S. 19 ..... 25, 33
Harrison v. *United States*, 392 U.S. 219 ..... 35, 38
Haynes v. *United States*, 390 U.S. 85 38
Hernandez v. *United States*, 300 F. 2d 114 18
Holland v. *United States*, 348 U.S. 121 ..... 35, 36
Johnson v. *United States*, 318 U.S. 189 37

Cases—Continued

	Page
Kingsley Books, Inc. v. *Brown*, 354 U.S. 436	28
Leary v. *United States*, 395 U.S. 6	9, 14, 15, 16, 17, 21, 22, 24, 26, 27, 30, 37, 38
Luria v. *United States*, 231 U.S. 9	36
Marchetti v. *United States*, 390 U.S. 39	38
Mobile, J.S.K.C. RR. v. *Turnipseed*, 219 U.S. 35	36
Morrison v. *California*, 291 U.S. 82	36
Pereira v. *United States*, 347 U.S. 1	27
Rossi v. *United States*, 289 U.S. 89	36
Roviaro v. *United States*, 353 U.S. 53	25, 27
Rugendorf v. *United States*, 376 U.S. 528	26, 35, 36
Simmons v. *United States*, 390 U.S. 377	39
Stutz v. *Bureau of Narcotics*, 56 F. Supp. 810	23
Tot v. *United States*, 319 U.S. 463	14, 27
United States v. *Coke*, 364 F. 2d 484, certiorari denied, 386 U.S. 918	30
United States v. *Fleischman*, 339 U.S. 349	36
United States v. *Gainey*, 380 U.S. 63	12, 14, 15, 27, 36, 40, 41, 42
United States v. *Haden*, 397 F. 2d 460	19
United States v. *Jackson*, 390 U.S. 570	42
United States v. *Jin Fuey Moy*, 241 U.S. 394	32
United States v. *Liss*, 137 F. 2d 995, certiorari denied, 320 U.S. 773	20
United States v. *Llanes*, 374 F. 2d 712	37
United States v. *Martinez*, 333 F. 2d 80, certiorari denied, 379 U.S. 907	30
United States v. *Peeples*, 377 F. 2d 205	37
United States v. *Reid*, 347 F. 2d 344	30
United States v. *Romano*, 382 U.S. 136	14
Williams v. *United States*, 371 F. 2d 141	26
Wilson v. *United States*, 162 U.S. 613	26
Yee Hem v. *United States*, 268 U.S. 178	13, 24, 36, 37
Statutes and rules:	
Act of February 9, 1909, Sec. 2, 35 Stat. 614 (21 U.S.C. 173)	18
Act of June 7, 1924, 43 Stat. 657 (21 U.S.C. 173)	18
Act of July 18, 1956, 70 Stat. 572 (18 U.S.C. 1402)	18
Act of April 22, 1960, Sec. 16, 74 Stat. 67 (21 U.S.C. 513)	18

Statutes and rules—Continued

The Internal Revenue Code of 1954, 68A Stat. 550, 26 U.S.C. 4701 *et seq.*:

Page

Sec. 4701 ---- 4
Sec. 4703 ---- 4
Sec. 4704 ---- 3, 5, 8, 9, 13, 14, 32, 33, 34, 40
Sec. 7237 ---- 4, 5

The Narcotics Drugs Import and Export Act of 1909, as amended, 70 Stat. 570:

Sec. 2(c), 21 U.S.C. 174 ---- 2, 4, 5, 6, 9, 13, 14, 15, 17, 25, 28, 30, 31, 37, 40
Sec. 2(h), 21 U.S.C. 176a ---- 15
Sec. 2(i), 21 U.S.C. 176b ---- 17

Opium Poppy Control Act of 1942, 56 Stat. 1045 (21 U.S.C. 188) ---- 23
40 Stat. 1130 ---- 32
18 U.S.C. (1958 ed.) 545 (originally Sec. 4 of the Smuggling Act of 1866, 14 Stat. 178, 179 ---- 18
26 U.S.C. 5601(a)(4) ---- 40
26 U.S.C. 5601(b)(2) ---- 40

Miscellaneous:

Bureau of Narcotics Annual Report, 1967 ---- 31
Commission on Narcotic Drugs, 23rd Sess. (Geneva, January 13–31, 1969). Statement by the United States Delegation on the Illicit Traffic, SD/E/CN. 7/131 Annex A ---- 19
Hearings before a Special Subcommittee of the Senate Committee on the Judiciary, pursuant to S. Res. 199 on S. 2113, etc., 89th Cong., 2d Sess. (1966) ---- 21
Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) ---- 21
H. Rep. No. 2003, 60th Cong., 2d Sess. (1909) ---- 18
H. Rep. No. 767, 65th Cong., 2d Sess. (1918) ---- 32
H. Rep. No. 2528, 77th Cong., 2d Sess. (1942) ---- 23
Kusevic, *Cultivation of the opium poppy and opium production in Yugoslavia*, 12 U.N. Bulletin on Narcotics, No. 2, April–June 1960 ---- 22
Lasagna, *Addicting Drugs and Medical Practice* in Wilner and Kasselbaum (eds.), *Narcotics* (1965) ---- 20

Miscellaneous—Continued
Louria, *Major Medical Complications of Heroin Addiction*, 67 Annals of Internal Medicine ---------- Page 21
Martin and Fraser, *A Comparative Study of Physiological and Subjective Effects of Heroin and Morphine Administered Intravenously in Postaddicts*, 133 Journal of Pharmacology and Experimental Therapy 388 ---------- 20
Maurer & Vogel, *Narcotics and Narcotic Addiction*, 2d ed (1962) ---------- 23, 29, 33
McCormick, *Evidence* (1954) ---------- 24
Opium Poppy and Other Poppies, The, U.S. Treasury Department, Bureau of Narcotics (1944) ---------- 22
President's Commission on Law Enforcement & Administration of Justice, The, Task Force Report: *Narcotics and Drug Abuse* ---------- 21, 23
Ramanathan, *The Opium Poppy, Its Cultivation & Harvesting*, U.N. Doc. GEN/NAR/67/CONF. 2/5 -- 22
S. Rep. No. 1997, 84th Cong., 2d Sess. (1956) -------- 18, 24
Smith and Beecher, *Subjective Effects of Heroin and Morphine in Normal Subjects*, 136 Journal of Pharmacology and Experimental Therapy 47 ---------- 20
Suppression of Poppy Cultivation in the United States, The, 2 U.N. Bulletin on Narcotics (2d ed. 1962) -- 23
U.N. Commission on Narcotic Drugs, Report of the Eighteenth Session, E/3775/E/CN.7/455 (1963) ---- 21
U.N. Regional Consultative Group on Opium Problems, *The Opium Poppy and Its Alkaloids*, U.N. Doc. GEN/NAR/67/CONF. 2/4 ---------- 22

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 190

JAMES TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 25–29) is reported at 404 F. 2d 782.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1968 (A. 30). The petition for a writ of certiorari was filed on January 8, 1969, and was granted on June 2, 1969 (395 U.S. 933; A. 31). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, as here applied, the provision in 21 U.S.C. 174 that a defendant's possession of heroin is

sufficient evidence to authorize his conviction, unless the defendant explains his possession to the satisfaction of the jury, is valid under the Due Process and Self-Incrimination Clauses of the Fifth Amendment.

2. Whether the application in this case of the provision in 26 U.S.C. 4704(a) that the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie* evidence of a violation by the person in possession of the drugs violated either the Due Process or Self-Incrimination Clause of the Fifth Amendment.

STATUTES INVOLVED

The Narcotic Drugs Import and Export Act of 1909, Sec. 2(c), as amended, 70 Stat. 570 (21 U.S.C. 174), provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, 26 U.S.C. 4704 (68A Stat. 550), provides:

§ 4704. Packages.

(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

(b) Exceptions in case of registered practitioners.

The provisions of subsection (a) shall not apply—

(1) Prescriptions.

To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705(c)(2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722; and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said

prescription bears the name and registry number of the druggist, and name and address of the patient, serial number of prescription, and name, address, and registry number of the person issuing said prescription; or

(2) Dispensations direct to patients.

To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on all four counts of an indictment charging narcotics violations at the same location and on the same date (June 1, 1967). Count One charged that he knowingly received, concealed and facilitated the transportation of heroin after illegal importation into the United States, knowing that the heroin had been illegally imported, in violation of 21 U.S.C. 174. Count Two charged that he knowingly purchased, possessed and distributed the heroin not in or from the original stamped package, in violation of 26 U.S.C. 4704(a).[1] Count Three charged that he knowingly received, concealed and facilitated the transpor-

[1] This count, as well as Count Four, alleged that the acts were also in violation of 26 U.S.C. 4701, 4703 and 7237(a).

tation of cocaine hydrochloride after illegal importation into the United States, knowing that the cocaine had been illegally imported, in violation of 21 U.S.C. 174. Count Four charged that he knowingly purchased, possessed and distributed the cocaine not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (A. 7–8). On November 14, 1967, petitioner was sentenced to imprisonment for a total of twenty years—concurrent sentences of ten years on Count One and five years on Count Two to run consecutively with concurrent sentences of ten years on Count Three and five years on Count Four.[2]

1. The evidence adduced by the government showed that on June 1, 1967, federal narcotics agents arrested petitioner and two other individuals shortly after their automobile emerged from the Lincoln Tunnel in Weehawken, New Jersey, following a trip from New York City.[3] While the occupants of the vehicle were being searched, but before the actual personal search of petitioner had commenced, petitioner threw a tinfoil package containing cocaine to the top of a nearby wall. Thereafter, government agents found a tinfoil package containing heroin under the front seat of the vehicle (A. 16–17, 25–26; Tr. 57–58).[4] The package

[2] After verdict and before sentencing information as to a prior narcotics conviction had been filed (A. 2). See 26 U.S.C. 7237(c)(2); 21 U.S.C. 174.

[3] Prior to trial, the district judge denied a motion to suppress the evidence. The court found probable cause for the arrest and that the search of the persons and the vehicle were incidental to the arrest.

[4] The heroin was in a tinfoil package containing eleven bundles, and each bundle in turn contained 25 double glassine bags (a total of 275 double glassine bags) (Tr. 59–60, 20).

containing cocaine weighed 14.68 grams and was a mixture of cocaine hydrochloride and sugar, five percent of which was cocaine. The package containing heroin weighed 48.25 grams and was a mixture of heroin, cinchonal alkaloid, mannitol and sugar, 15.2 percent of which was heroin (Tr. 89, 43–44). None of the containers had any tax stamps affixed (Tr. 59, 62). The government offered no evidence as to the origin of the drugs; nor did it introduce any direct evidence that petitioner had purchased or sold the drugs. The vehicle, in which the heroin was found, was registered in petitioner's name. Petitioner did not testify or offer any evidence on his own behalf.

2. The court instructed the jury that they were "the sole and exclusive judges of the facts" (A 9); that the government had the burden of satisfying the jury that the defendant was guilty beyond a reasonable doubt; and that the defendant was presumed to be innocent (A. 12–13). The court then read to the jury Count One of the indictment and 21 U.S.C. 174, the statute under which that charge was brought, including the provision that possession is sufficient evidence "to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury" (A. 14–15). The court thereafter charged as follows (A. 15–16):

> Now, obviously there is no evidence in this case that this particular defendant knew that this cocaine and this heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving

knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of violation of the statute, unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading.

I believe in an overabundance of caution, in view of the reference made by counsel for the defendant in his summation, the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant. In other words, you must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant of the offense proscribed by the section which I read to you in order to find the defendant guilty of a violation of that section.

After summarizing the evidence (A. 16–17), the court advised the jury that the violation charged in Count Three was similar to that in Count One except that the drug was different (A. 17–18). The court then said (A. 17–18):

* * * Therefore, if in the light of all the evidence as you find it to be, and the inferences

> which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense charged therein. On the other hand, unless you are so convinced unanimously beyond a reasonable doubt your verdict must be a verdict of not guilty in favor of the defendant.

The court then dealt with the two counts based on the original stamped package requirement and read to the jury the charge under these counts and the statute involved, 26 U.S.C. 4704(a), including its *prima facie* evidence provision (A. 18). The court continued (A. 18–19):

> Now, the testimony presented by the Government here is uncontradicted that none of the material which was seized by the Treasury agents was either in or appeared to be taken from a package bearing the stamps required by the Internal Revenue laws. That requirement is in the preceding section to that which I read you, which requires that the stamps required by a later section for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper covering or wrapper thereof and the later section, which deals directly with narcotic drugs as the subject of excise taxes requires that the stamps imposed by two other sections of the same Title shall be obtained or provided by the Secretary of the Treasury or his delegate and shall be applicable to narcotic drugs * * *. I don't think

> you are going to have any difficulty with counts two and four * * * because they charge violations of the Internal Revenue laws and the evidence in this case stands uncontradicted that the substances which were received by the Treasury agents in this case were not from the original stamped package and the packages thereof so seized bore no stamps as required by the statute.
>
> So that in effect your problem, your principal problem here will be to determine whether or not certain quantities of heroin hydrochloride and cocaine hydrochloride which have been marked in evidence in this case were in the possession or under the control or both of the defendant in this case, James Turner, on June 1, 1967 when they were seized by the United States Treasury agents in Weehawken in the District of New Jersey.

Petitioner did not object to the instructions concerning the statutory presumptions contained in 21 U.S.C. 174 and 26 U.S.C. 4704(a) (A. 22); nor did he in any other way question the constitutionality of these provisions at the trial.

SUMMARY OF ARGUMENT

I

1. The statutory inference, applicable to Count One, that petitioner's heroin had been illegally imported is rational. All heroin in the United States is smuggled here from abroad. In contrast to marijuana, which was involved in *Leary* v. *United States,* 395 U.S. 6, there is no substantial likelihood that any heroin is

produced domestically. The opium poppy from which raw opium is processed is not grown in the United States, and it is unlawful to import opium products for the purpose of producing heroin. No clandestine laboratory engaged in the production of heroin from stolen opium or morphine has been discovered in recent years; and, even if it were assumed that the entire quantity of these drugs stolen in numerous separate thefts were aggregated into such laboratory operations, the amount of heroin so produced would be less than one percent of that illegally imported. Since the presumption that heroin is illegally imported thus mirrors reality, it was proper for Congress to permit juries so to conclude without the necessity of repetitive proof of this fact in every case.

Since all heroin is illegally imported, it is also proper for the statute to permit a jury to infer that a person possessing it would be aware of its foreign origin. This statutory inference merely follows recognized principles of criminal law by according to the evidence, if unexplained, "its natural probative force." It is as rational to infer knowledge of illegal importation from possession of heroin as it is, for example, to infer knowledge of theft from possession of recently stolen property. The jury could, therefore, properly infer from petitioner's possession of two hundred seventy-five bags of heroin that he was aware that it had been illegally imported.

2. Petitioner's conviction under Count Three should not be sustained because the statutory presumption that he knew that the small amount of cocaine in his

possession had been illegally imported lacks adequate rational foundation. Unlike heroin, cocaine is legally manufactured and distributed in the United States, and substantial quantities of it are stolen from legitimate sources. It is as rational to assume that petitioner believed that his cocaine had been obtained in such a theft as it is to assume that he believed that it had been illegally imported. Accordingly, we concede that partitioner's conviction should be reversed as to Count Three.

II

The statutory presumption, applicable to Counts Two and Four, that the possession of narcotic drugs without taxpaid stamps "shall be prima facie evidence" that the possessor purchased the drug from an unstamped package was rationally applied in this case. Since there are no stamped packages of heroin from which unstamped heroin can be acquired, the inference of guilt as to this drug flows naturally from its possession. The inference was also rationally applied to petitioner's possession of the cocaine, since it was in a non-medicinal mixture that is not found in stamped packages, and since other circumstances in the case suggest that petitioner had purchased narcotics in the illicit trade.

III

1. So long as it is rational to infer the presumed fact from the proved fact, the inference does not impermissibly compel the defendant to testify and, there-

fore, does not abridge his privilege against self-incrimination. When a defendant is motivated to testify by the strength of the lawful evidence adduced against him, including the inferences rationally deduced therefrom, his right to remain silent has not thereby been impermissibly impaired. The situation is no different in principle whether it is a statute, or a judicially created rule, which provides that a particular rational inference may be derived from the evidence. In both circumstances, the constraint to testify arises from the facts in evidence and not from any unconstitutional compulsion.

Nor is the privilege against self-incrimination violated because petitioner, if he had testified, might have incriminated himself under other laws. This is one of a variety of risks to which an accused inevitably exposes himself when he testifies, but such risks do not invalidate the statute under which he is charged.

2. The trial court's instructions concerning the statutory presumptions did not constitute an adverse comment on petitioner's failure to testify. As in *United States* v. *Gainey*, 380 U.S. 63, the jury was merely permitted to draw rational inferences from the unexplained circumstantial evidence presented by the government. The jury was also admonished that the burden of proving guilt beyond a reasonable doubt was on the government, notwithstanding the statutory presumptions.

ARGUMENT

This case involves challenges to the constitutional validity of two statutory presumptions relating to

"hard" narcotics. The first, in 21 U.S.C. 174, which prohibits the possession of such drugs by one who knows that they were unlawfully imported, provides that at a trial proof of possession of the narcotic drug by the defendant "shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." The second, in 26 U.S.C. 4704(a), which makes it unlawful to purchase or sell drugs except in the original stamped package, provides that the absence of appropriate tax stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."[5] The constitutionality of each of these presumptions has previously been upheld by this Court: that of Section 174 in *Yee Hem* v. *United States,* 268 U.S. 178, and that of Section 4704(a) in *Casey* v. *United States,* 276 U.S. 413. The grant of certiorari in the present case, therefore, calls for a reexamination of the continuing validity of these decisions. It is the government's position that this reexamination should lead to a reaffirmation of *Yee Hem* and *Casey* regarding the validity of these presumptions.[6]

---

[5] Section 4704(a) does not apply to any person possessing narcotic drugs under a prescription issued by a physician or other registered practitioner where the container holding the drugs has the requisite information concerning the druggist and the person issuing the prescription, or, if directly dispensed by an authorized practitioner, where required records are kept as to such dispensation.

[6] We concede, however, under Count Three that petitioner's conviction should be reversed because it was improper to apply the Section 174 presumption to his possession of cocaine in the circumstances of this case (see *infra*, pp. 28–32).

We first urge that, unlike the presumption of knowledge as to source with regard to marijuana which this Court held invalid in *Leary* v. *United States,* 395 U.S. 6, the application of the Section 174 presumption to heroin rests upon a solid rational foundation and therefore satisfies due process requirements. We next show that the applications herein of the presumption contained in 26 U.S.C. 4704(a) were also founded in reason. We then contend that, given the rationality of the inferences these statutes permit, petitioner's self-incrimination arguments should not be sustained.

I

THE TRIAL COURT'S CHARGE UNDER 21 U.S.C. 174 THAT THE JURY WAS ENTITLED TO CONVICT UPON A FINDING OF UNEXPLAINED POSSESSION OF THE HEROIN DID NOT VIOLATE THE REQUIREMENTS OF DUE PROCESS

A. IT WAS RATIONAL FOR THE JURY TO CONCLUDE FROM PETITIONER'S POSSESSION OF THE TWO HUNDRED SEVENTY-FIVE BAGS OF HEROIN THAT THE HEROIN WAS ILLEGALLY IMPORTED INTO THE UNITED STATES AND THAT PETITIONER HAD KNOWLEDGE OF ITS ILLEGAL IMPORTATION

In *Leary* v. *United States,* 395 U.S. 6, 32–36, this Court reaffirmed that, as previously stated in *Tot* v. *United States,* 319 U.S. 463, *United States* v. *Gainey,* 380 U.S. 63, and *United States* v. *Romano,* 382 U.S. 136, the "rational connection" test is the controlling standard for determining the constitutional validity of a criminal statutory presumption. The formulation of the test in *Tot* v. *United States, supra,* 319 U.S. at 467–468, was that "* * * a statutory presumption cannot be sustained if there be no rational connection between

the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." In *Gainey, supra,* 380 U.S. at 67, the Court explained how the question of rationality was to be resolved:

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

And in *Leary,* the rationality standard was restated as follows (395 U.S. at 36):

> * * * [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. * * *

Under this standard, the statutory presumption involved in *Leary* was held invalid. That presumption was contained in 21 U.S.C. 176a, dealing with marihuana. The marihuana statute, like Section 174, authorized the jury to infer from the defendant's possession of that particular drug two necessary elements of the crime: (1) that the drug was imported into the United States illegally, and (2) that the defendant knew of the unlawful importation of the drug. Based upon its analysis of "the available, pertinent data" (395 U.S. at 38), the Court in *Leary*

found that "a significant percentage of domestically consumed marihuana may not have been imported at all," but may have been grown in this country (395 U.S. at 46; see *id.* at 39–43). In these circumstances, the Court held that "to sustain the inference of knowledge we must find on the basis of the available materials that a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marihuana was grown abroad" (395 U.S. at 46–47; emphasis in original). Upon an examination of such data, the Court concluded that there was insufficient support for an inference that the marihuana consumer knew that this drug came from abroad.[7]

The Court significantly pointed out in *Leary,* however, that "if it were proved that little or no marihuana is grown in this country," the inference that the user knew that his marihuana was imported "might be thought justified by common sense" (395 U.S. at 46). We submit that such a "common sense" conclusion as to knowledge by the possessor of heroin is justified. For, as we will demonstrate, heroin is not produced in or legally imported into the United States. It is thus entirely rational, indeed inescapable, to infer that a substantial amount of heroin hidden under the seat of an automobile (as in this case) was illegally imported, and it is also rational to infer

[7] Accordingly, the Court found it unnecessary to decide whether the presumption that the marihuana was illegally imported was valid.

as a matter of "common sense" that the possessor of that heroin knew[8] of its illegal importation.

1. Heroin is neither produced in nor legally imported into the United States

In prosecutions under 21 U.S.C. 174, Congress has authorized the jury to infer from the defendant's possession of narcotic drugs that the drugs were imported into the United States illegally.[9] Congress thus excused the government from having to establish this element of the crime in every case by formally proving that such drugs have an illegal foreign origin. As applied to heroin, this approach is constitutionally permissible because this drug is neither produced in nor legally imported into the United States. Indeed, the fact of illegal foreign origin is for practical purposes almost irrefutable.

Heroin is an opium derivative, resembling morphine from which it is prepared. At one time it was considered useful for medicinal purposes, but it no longer is used in medical practice in the United States.[10] See

---

[8] The definition of "knowledge" adopted by this Court in *Leary* is, we believe, equally applicable here—*i.e.*, knowledge of a fact "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." 395 U.S. at 46 n. 93.

[9] 21 U.S.C. 176b, which makes it a crime knowingly to give or sell unlawfully imported heroin to any person under the age of eighteen years, also provides that possession shall be sufficient proof that the heroin was unlawfully imported unless the defendant explains his possession to the satisfaction of the jury.

[10] Small quantities of heroin are used in the United States in scientific experimentation (see, *e.g.*, authorities cited in note 16, *infra*). We are informed by the Bureau of Narcotics and Dangerous Drugs that heroin used for this purpose is supplied entirely from quantities seized by law enforcement officials.

S. Rep. No. 1997, 84th Cong., 2d Sess. p. 7 (1956). Beginning in 1909 with the narcotic drug import statute presently before the Court,[11] Congress has enacted a series of laws "all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics." *Gore* v. *United States,* 357 U.S. 386, 391. Since the 1909 enactment, it has been unlawful to import opium except for medicinal purposes. Act of February 9, 1909, Section 2, 35 Stat. 614 (21 U.S.C. 173). And for more than forty-five years, it has been unlawful to import opium for the purpose of manufacturing heroin. Act of June 7, 1924, 43 Stat. 657 (21 U.S.C. 173). Finally, in 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, 70 Stat. 572 (18 U.S.C. 1402). See *Hernandez* v. *United States,* 300 F. 2d 114, 118, n. 11 (C.A. 9).[12]

Nor is there a substantial likelihood that any heroin is produced domestically. While there is a theoretical possibility of such production in a clandestine laboratory in the United States, the director of the Bureau of Narcotics and Dangerous Drugs has recently stated

[11] The statutory inference is modeled after 18 U.S.C. 545 (1958 ed.), originally Section 4 of the Smuggling Act of 1866, 14 Stat. 178, 179. See H. Rep. No. 2003, 60th Cong., 2d Sess. (1909).

[12] In 1960, Congress provided that the Secretary of the Treasury could authorize the importation of "any narcotic drug" for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes." Act of April 22, 1960, Section 16, 74 Stat. 67 (21 U.S.C. 513). We are informed by the Bureau of Narcotics and Dangerous Drugs, however, that the Secretary of the Treasury has never in fact permitted any importation of heroin under this statute. See *supra*, n. 10.

that "[h]eroin is not produced in the United States and we have not found a single clandestine laboratory for many years * * *." [13] Even if there were such a laboratory, it would require a supply of raw opium or morphine, which probably would have been illegally smuggled into the United States for this purpose. The quantities of legally imported opium and morphine that are stolen in this country [14] would seem to suggest that it is unlikely that such thefts are being employed to sustain commercial clandestine heroin laboratory operations [15]—especially in light of the

[13] Commission on Narcotic Drugs, 23d Sess. (Geneva, January 13–31, 1969), Statement by the United States Delegation on the Illicit Traffic, SD/E/CN.7/131 Annex A, p. 3. In *United States* v. *Haden*, 397 F. 2d 460 (C.A. 7), the defendant took preliminary steps to produce heroin, but his operation was stifled before any heroin was actually produced.

[14] A tabular report of such thefts for the ten calendar years 1959–1968 has been compiled from the records of the Bureau of Narcotics and Dangerous Drugs and is reproduced as an appendix to this brief (*infra*, p. 44). The Bureau informs us that, of the drugs there listed, only opium and morphine could be converted into heroin because none of the other drugs include morphine alkaloid—the base from which heroin is derived.

[15] The Bureau of Narcotics and Dangerous Drugs informs us that the largest total quantity of opium stolen annually in the past ten years (12.9 kilograms in 1965) would yield no more than 1 kilogram of heroin, and the largest total quantity of morphine (10.2 kilograms in 1965) would yield approximately 10.2 kilograms of heroin. Because of the large number of individual thefts involved (see Appendix, *infra*, p. 44), however, it cannot reasonably be believed that all the opium and morphine stolen throughout the United States in a given year was channeled into a single clandestine laboratory for conversion into heroin. In 1968, for example, the largest single theft of opium was of 226.4 grams from the Hawley Pharmacy in Millers Falls, Massachusetts, and the largest single theft of morphine was of 149.1 grams from the Walgreen Drug Company in Louisville, Kentucky.

fact that the stolen morphine (which is more easily converted into heroin and produces a greater yield thereof) can be consumed by heroin addicts without conversion in satisfaction of their needs [16] and may well be preferred to heroin by consumers because there is greater assurance as to the potency and uniformity of the product. In any event, even if it were to be assumed (however unrealistically) that all of the legally imported opium and morphine stolen in this country in numerous individual thefts each year is in fact converted into heroin, the quantity of heroin so produced in any year (see *supra*, n. 15) would be an insignificant fraction of the total supply [17]—less than

---

[16] See Lasagna, *Addicting Drugs and Medical Practice*, in Wilner and Kassebaum (eds.), *Narcotics* (1965), pp. 53, 58; Martin and Fraser, *A Comparative Study of Physiological and Subjective Effects of Heroin and Morphine Administered Intravenously in Postaddicts*, 133 Journal of Pharmacology & Experimental Therapy 388; Smith and Beecher, *Subjective Effects of Heroin and Morphine in Normal Subjects*, 136 Journal of Pharmacology & Experimental Therapy 47.

[17] *Amicus* Burgess suggests that there may also be domestic synthesis of heroin (*Amicus* Br. p. 11). The only authority he cites, however, is a case (*United States* v. *Liss*, 137 F. 2d 995, 997 (C.A. 2), certiorari denied, 320 U.S. 773) in which efforts to reconstitute opium from its derivative drugs and also to synthesize morphine from non-opium products were unsuccessful. We are informed by the Bureau of Narcotics and Dangerous Drugs that synthetic heroin has never, to its knowledge, been produced, and that experimental production of synthetic morphine indicates that it would be extremely arduous to do so. In any event, the Bureau informs us that synthetic heroin would be chemically distinguishable from opium-derived heroin because the latter always contains at least a trace of narcine (a natural opium alkaloid). In the present case, of course, petitioner did not claim that the heroin found in his possession and chemically identified as such was not genuine, opium-derived heroin.

one percent of the estimated 1,500 kilograms of heroin smuggled into the United States annually.[18]

In contrast to marihuana, there is no domestic supply of raw opium or of the opium poppy from which raw opium is processed. In *Leary* v. *United States, supra,* 395 U.S. at 39–40, this Court noted the testimony of the former Commissioner of Narcotics before a congressional committee that there is a "considerable volunteer growth" of marijuana in the Middle West, and other testimony that marijuana was grown in Texas. At the same hearing, however, the then Commissioner stated that heroin comes "from opium that is smuggled out of Turkey, Iran, India, and Yugoslavia. It is made into heroin in clandestine laboratories and smuggled into this country." [19] There was no intimation in his testimony that the opium poppy, the cultivation of which is prohibited by federal statute,[20] was being produced in the United States. Indeed, it has been unequivocally stated that the United States is not an opium producing country. The President's Com-

[18] See The President's Commission on Law Enforcement & Administration of Justice, Task Force Report: *Narcotics and Drug Abuse*, p. 6; U.N. Commission on Narcotic Drugs, Report of the Eighteenth Session, E/3775/E/CN.7/455, p. 15 (1963); Louria, *Major Medical Complications of Heroin Addiction*, 67 Annals of Internal Medicine, p. 1.

[19] Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (parts), p. 31. Some heroin is also produced in Mexico. Hearings before a Special Subcommittee of the Senate Committee on the Judiciary pursuant to S. Res. 199 on S. 2113, etc., 89th Cong., 2d Sess., pp. 446–447 (1966).

[20] See *infra*, n. 26.

mission on Law Enforcement and Administration of Justice, Task Force Report: *Narcotics and Drug Abuse,* Appendix A–2, p. 40. While it is biologically possible to grow the opium poppy in this country, it is a "very delicate plant and requires extreme care in its cultivation." [21] Moreover "[t]he harvesting of opium is a laborious and time consuming process, and is only possible in countries with an adequate supply of cheap laborers." [22] The poppies have "an astonishing range of colours," [23] so that any substantial growth could hardly be kept secret for very long. From a practical viewpoint, therefore, undetected cultivation of the poppy in this country in quantities adequate for substantial commercial use would seem to be beyond the range of possibility. See *Az Din* v. *United States,* 232 F. 2d 283 (C.A. 9), certiorari denied, 352 U.S. 827. Indeed, if one considers further the paucity of prosecutions for such growth and the absence of any other evidence that there is growth of the poppy in this country—*e.g.,* reports of the destruction of acres of domestic poppy [24]—the conclusion seems inescapable that ex-

[21] Ramanathan, *The Opium Poppy, Its Cultivation and Harvesting,* U.N. Doc. GEN/NAR/67/CONF. 2/5 at p. 3 (1967).

[22] U.N. Regional Consultative Group on Opium Problems, *The Opium Poppy and Its Alkaloids,* U.N. Doc. GEN/NAR/67/CONF. 2/4 at p. 7 (1967). See, also, Kusevic, *Cultivation of the opium poppy and opium production* in Yugoslavia. 12 U.N. Bulletin on Narcotics, No. 2, April-June 1960, p. 5. The Opium Poppy, U.N. Doc. GEN/NAR/67/CONF. 2/5.

[23] *The Opium Poppy,* U.N. Doc. GEN/NAR. 67/CONF. 2/5 p. 2. See, also, *The Opium Poppy and Other Poppies,* U.S. Treasury Department, Bureau of Narcotics (1944).

[24] Contrast *Leary* v. *United States, supra,* in which the empirical evidence suggested a substantial amount of domestically producted marijuana which was thus destroyed.

tremely little, if any, opium poppy is being cultivated in this country.[25]

In sum, the only realistic conclusion is that the heroin which is trafficked in the United States has been smuggled from abroad after it has been converted from morphine at overseas clandestine chemical laboratories. The President's Commission on Law Enforcement and Administration of Justice stated, in its Task Force Report: *Narcotics and Drug Abuse* (1967), p. 3 (footnote omitted):

> Heroin occupies a special place in the narcotics laws. It is an illegal drug in the sense that it may not be lawfully imported or manufactured under any circumstances, and it is not available for use in medical practice. All the heroin that reaches the American user is smuggled into the country from abroad, the Middle East being the reputed primary point of origin. All heroin transactions, and any possession of heroin, are therefore criminal. * * *

---

[25] During World War II, there was an effort to promote domestic growth of the opium poppy because of the rise of the price of the poppy seed for baking purposes. H. Rep. No. 2528, 77th Cong., 2d Sess. p. 2 (1942). As a result Congress passed the Opium Poppy Control Act of 1942, which prohibits the production of the opium poppy by any person not licensed under the Act to do so. 56 Stat. 1045 (21 U.S.C. 188). The Bureau of Narcotics has informed us, however, that the Secretary of the Treasury has not issued any licenses to produce opium under this Act and that only a small amount of opium for scientific purposes is legally being cultivated in the United States. See, generally, *The Supression of Poppy Cultivation in the United States*, 2 U.N. Bulletin on Narcotics No. 3, p. 9. See, also Maurer and Vogel, *Narcotics and Narcotic Addiction* (2d ed. 1962) p. 212; *Stutz* v. *Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal).

In the present case, in which a substantial amount of heroin was found hidden under the seat of an automobile, it thus may be concluded "with substantial assurance that the presumed fact [illegal importation] is more likely than not to flow from the proved fact [possession] on which it is made to depend." *Leary, supra,* 395 U.S. at 36.

Indeed, since there is no real possibility of the existence of domestically produced heroin, the presumption that the heroin came from abroad has rarely been contested until recently.

In *Yee Hem* v. *United States,* 268 U.S. 178, 184, this Court, in upholding this very presumption in 1925, said: "We think it is not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported." The additional passage of time and the subsequent history of heroin legislation which we have detailed [26] serve only to strengthen the presumption. [27]

---

[26] One of the purposes of requiring the surrender of all theretofore lawfully possessed heroin in 1956 was to strengthen the statutory presumption. S. Rep. No. 1997, 84th Cong., 2d Sess. p. 7.

[27] Indeed, had Congress not left it to the jury to decide whether or not to draw the inference, we believe that the conclusion that heroin is unlawfully imported could properly be reached by judicial notice. As Professor McCormick has stated, such "judicial notice is not merely a substitute for formal proof by witnesses but is itself another method of proof of certain kinds of facts, namely, the method of research into the professionally authoritative books and reports in the particular field." McCormick, *Evidence* (1954), p. 712.

It would not benefit a defendant on the issue of his guilt or innocence to require the government in every case to call expert witnesses to prove the obvious—that heroin is illegally imported. To be sure, if formal proof were offered or required, a jury could disregard the government's evidence showing illegal importation. But, by the same token, a jury could also decide not to draw the inference authorized by the statutory provision. Since the presumption closely mirrors actuality, it was proper for Congress to relieve the courts and the government of the useless burden of proving the obvious in every case.

2. Since all heroin is illegally imported, it is rational to permit a jury to infer that a person in possession of two hundred seventy-five bags of heroin knows that it was illegally imported.

In addition to authorizing the jury to conclude that heroin in a defendant's possession was illegally imported, 21 U.S.C. 174 permits the jury to infer further that the possessor knows that it was illegally imported. Under the statute, the government thus makes a submissible case by proving possession. *Harris* v. *United States,* 359 U.S. 19, 23; see also *Roviaro* v. *United States,* 353 U.S. 53, 63.

We submit that the inference of knowledge is supported by the "intermediate step" found lacking in *Leary*. Unlike the situation with regard to marijuana, there is extremely little or no domestically produced heroin. Accordingly, just as a dealer in Rolls Royce automobiles or French perfumes could reasonably be charged with awareness of the foreign origin of the product, so it is a "common sense" conclusion

that "most [heroin] possessors are aware of the level of importation and have deduced that their own [heroin] was [made] abroad." *Leary* v. *United States, supra,* 395 U.S. at 46. Indeed, the fact that heroin comes from abroad illegally has received such widespread notoriety in the news media—both on television and in the press—that any person of ordinary intelligence, whether he deals in heroin or not, could fairly be charged with knowledge that it derived from a foreign source.

By permitting a jury to infer knowledge from possession of the heroin, Congress has merely applied recognized principles of criminal law. As long ago as 1896, this Court dealt with a similar problem in *Wilson* v. *United States,* 162 U.S. 613, 619. It was there held that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence." More recently, this ruling was followed in *Rugendorf* v. *United States,* 376 U.S. 528, 536–537. Again, where it is proved that the accused has in his possession a vehicle recently stolen in another state, the jury is permitted to draw the inference not only that the accused knew the vehicle was stolen but that he transported it in interstate commerce. See, *e.g., Beufve* v. *United States,* 374 F. 2d 123, 125 (C.A. 5); *Williams* v. *United States,* 371 F. 2d 141, 144 (C.A. 10). In other circumstances, a jury has been allowed

to infer that a defendant had "common knowledge" of customary bank practices. See *Pereira* v. *United States,* 347 U.S. 1, 9. In all these situations there is a "rational connection between the fact proved and the ultimate fact presumed." *Tot* v. *United States, supra,* 319 U.S. at 467. In other words, just as the inferences permitted in the above illustrations are grounded in the lessons of common experience, so the inference of knowledge with regard to heroin authorized by Congress does "no more than 'accord to the evidence, if unexplained, its natural probative force.' " *United States* v. *Gainey, supra,* 380 U.S. at 71. After all, in our accusatorial system of criminal justice, which honors a privilege against self-incrimination, knowledge, when it is an element of a criminal offense, can seldom be established by direct proof and ordinarily is inferred by the jury from the conduct of the accused and the circumstances of the case. To the extent that this places upon a defendant the burden of coming forward and explaining his conduct and the circumstances (see *Roviaro* v. *United States, supra,* 353 U.S. at 63; *Casey* v. *United States,* 276 U.S. 413, 418), the burden does not stem from notions of "comparative convenience" (compare *Leary* v. *United States, supra,* 395 U.S. at 45); it is the inevitable consequence of the sufficiency of the government's evidence, of the manifest logic, in the present case, of inferring knowledge from the fact of possession.

The facts of this case demonstrate that it was eminently fair to permit the jury to infer that petitioner knew that the heroin was illegally imported. He was found in possession of two hundred seventy-five bags

of heroin—a quantity strongly suggesting that he was not a mere consumer, but was trafficking in the illicit narcotics trade. The heroin was hidden under the front seat of petitioner's automobile, and shortly after his arrest he threw a package containing cocaine to the top of a nearby wall. A jury with its "special aptitude for reflecting the view of the average person" [28] could, in these circumstances, properly infer that petitioner, as a possessor of a large quantity of heroin, "knew" (see *supra*, n. 25) that the heroin (like virtually all heroin in the United States) was illegally imported.

B. PETITIONER'S CONVICTION ON COUNT THREE, BASED UPON HIS POSSESSION OF A SMALL AMOUNT OF COCAINE HYDROCHLORIDE, SHOULD BE REVERSED BECAUSE IT CANNOT FAIRLY BE SUSTAINED UNDER THE RATIONAL CONNECTION TEST

Under Count Three, petitioner was convicted of violating the import statute, 21 U.S.C. 174, after the government proved that he had possession of a package weighing 14.68 grams [29] containing a mixture of cocaine hydrochloride and sugar, five percent of which was cocaine. The statutory presumption of knowledge of illegal importation does not, however, have the same solid factual foundation with respect to small amounts of cocaine that it has with respect to heroin.

Cocaine, a drug derived from the leaves of the coca plant which is cultivated extensively in parts of South America, is used legitimately as a local anesthetic. "Legitimately, cocaine is sold as cocaine hydrochlo-

[28] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 448 (dissenting opinion).

[29] A gram is about 1/28 of an ounce.

ride in powder form, in solution for injection, or in tablet form for the preparation of solutions. In contraband channels it is sold as the more or less pure powder and in such channels it has appeared in increasing quantity recently from South American sources. For sale to the ultimate addict-consumer, it is frequently sold in small papers of powder, cellophane packets, or gelatin capsules, containing about 1 grain." Maurer and Vogel, *Narcotics and Narcotic Addiction,* 2d ed. (1962) p. 115.

In *Erwing* v. *United States,* 323 F. 2d 674 (C.A. 9), the defendant had been convicted under Section 174 of receiving 9 grams and 300 milligrams of almost pure cocaine. At his trial, the record showed that cocaine hydrochloride was legally manufactured in this country for medical purposes; that a hospital would not be likely to have on hand more than three or four ounces, which it would keep under lock and key; that the ordinary drug store would carry in stock about one ounce; and that a lay person legitimately possessing cocaine hydrochloride would ordinarily have it in a dilute solution. The court of appeals, noting that the record further showed that cocaine hydrochloride was legally manufactured in this country by at least three major pharmaceutical manufacturers and that there was no evidence that this manufactured substance was imported into the United States either legally or illegally, held that there was no rational basis for inferring that the defendant knew the drug was illegally imported and, therefore, reversed the conviction. In three subsequent decisions, on the other

hand, the court of appeals for the Second Circuit upheld convictions under Section 174 based on possession of cocaine, finding in each case that the defendant had failed to establish by statistical or other proof that such application of the statutory presumption was irrational. *United States* v. *Coke,* 364 F. 2d 484 (C.A. 2), certiorari denied, 386 U.S. 918; *United States* v. *Reid,* 347 F. 2d 344 (C.A. 2); *United States* v. *Martinez,* 333 F. 2d 80 (C.A. 2), certiorari denied, 379 U.S. 907.

The above cases, as well as the instant case, were tried and decided upon appeal prior to this Court's decision in *Leary,* in which it was held that the application of a presumption would be unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36. In accord with that decision, we do not believe that petitioner's possession of the small amount of cocaine involved in this case—5 percent of a mixture of 14.68 grams, an amount which we assume is less than .75 grams of cocaine [30]—can be the basis for inferring "with substantial assurance" his knowledge of its illegal importation. It would be equally rational to assume that he believed that this small amount of cocaine was obtained as a result of theft from a legitimate source in this country. For, we are advised by the Bureau of Narcotics and Dangerous Drugs that large quantities of cocaine—hundreds of

[30] We have assumed that the sugar and the cocaine each had the same specific gravity.

kilograms annually—are legally manufactured and distributed in the United States primarily for medicinal purposes, and significant amounts thereof are introduced into the illicit traffic as a result of drug store burglaries and robberies. For example, the Bureau's records show that in 1967 (the year in which petitioner was arrested and tried) a total of 5,033 grams of cocaine were stolen in such thefts (see Appendix, *infra*, p. 44).[31]

This is not to say, however, that the presumptions contained in Section 174 may never be valid as to cocaine. Cases may arise in which the quantity of cocaine found in the defendant's possession is so large as to warrant an inference that he knew that the cocaine was illegally imported rather than obtained as a result of theft from a legitimate source. Or there may be other circumstances pointing to a foreign source. We believe, therefore, that the Court need not, and should not, now decide that the Section 174 presumptions can never appropriately be applied to possession of cocaine. We suggest only that in this case the presumption does not meet the requisite standard of

[31] The Bureau further advises us that its estimate (for comparison with the theft statistics in the Appendix, *infra*, p. 44) of the annual quantities of cocaine illegally imported is based on the following compilation of seizures at ports and borders. It estimates that these figures represent no more than approximately 10 percent of the total amount actually smuggled into the United States:

	Kilograms
1963	1.44
1964	17.71
1965	11.62
1966	2.53
1967	8.53

See Bureau of Narcotics Annual Reports, *e.g.*, 1967, p. 43.

rationality and that, accordingly, petitioner's conviction under Count Three of the indictment should be reversed.

II

AS APPLIED TO PETITIONER, THE STATUTORY PRESUMPTION CONTAINED IN 26 U.S.C. 4704(a) COMPLIED WITH THE REQUIREMENTS OF DUE PROCESS

As previously noted, petitioner was also convicted of having knowingly purchased, possessed, and distributed heroin (Count Two) and cocaine (Count Four) not in or from the original stamped package, in violation of 26 U.S.C. 4704(a). This statute provides that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." [32]

Since heroin is neither produced in nor legally imported into the United States (see *supra*, pp. 17–24), there would be no way to acquire it from a stamped package. Hence, as applied to heroin, the effect of this presumption is merely to state the obvious: that one in possession of unstamped heroin is in possession illegally, that is, that the heroin was not in a stamped package when he acquired it.

The application of this presumption to cocaine involves more complex considerations because, as we

[32] The statute was enacted in 1919 (40 Stat. 1130) to overcome the holding in *United States* v. *Jin Fuey Moy*, 241 U.S. 394, which construed the prohibition in the Harrison Act of 1914 of the possession of narcotics by "any person not registered" to be applicable only to a person in the class required to register. H. Rep. No. 767, 65th Cong., 2d Sess., p. 36 (1918).

have noted (*supra*, pp. 30–31), a substantial quantity of that drug is stolen from drug stores—and the thief presumably would acquire it in or from its stamped package. We believe, however, that this Court need not now decide whether the presumption could validly be applied to one found in possession solely of the quantity of cocaine involved herein. For the inference authorized by Section 4704(a) was clearly warranted in the circumstances of this case. Petitioner was found in possession of, not only the cocaine, but also a quantity of heroin strongly suggesting that he was trafficking in narcotics and had acquired the heroin by purchase in the illicit narcotics trade. Moreover, cocaine and heroin are sometimes used in combination by addicts,[33] and the cocaine, as found in petitioner's possession in a mixture with sugar, was not in a form in which it would have been distributed for medicinal purposes in stamped packages (see *supra*, pp. 28–29).[34] All of these circumstances strongly point to the conclusion that petitioner acquired the cocaine, just as he acquired the heroin, by purchase, not in or from the stamped package, in the illicit narcotics trade—regardless of whether the cocaine had been illegally imported (like the heroin) or had been stolen

---

[33] Maurer and Vogel, *Narcotics and Narcotic Addiction* (2d ed. 1962) p. 116.

[34] As in *Harris* v. *United States*, 359 U.S. 19, 23, none of the containers found in petitioner's possession had any stamps affixed.

from a drug store (and mixed with the sugar thereafter in the course of distribution).[35]

Accordingly, the decision in *Casey* v. *United States*, 276 U.S. 413, upholding the validity of this presumption, should be reaffirmed as applied to the facts of the present case.[36]

III

NEITHER STATUTORY PRESUMPTION VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioner's principal argument is that the use of the statutory presumptions violated his privilege against self-incrimination by impairing the free and unfettered exercise of his right to remain silent. *Amicus* Burgess, phrasing the argument somewhat differently, urges that the presumptions coerce a defendant into testifying, with the attendant danger that he might thus incriminate himself under other federal or state narcotic provisions (*Amicus* Br. 12–15). Our position is that if the requirements of due process have been satisfied—that is, if it is rationally permissible to infer the presumed fact from the proved fact, as we have shown is the situation in this case—then the alleged "coercion" to testify stems, not from any

[35] Moreover, even in the event that the cocaine had been stolen in or from a stamped package, it seems likely that, in order to facilitate concealment, the stamped package would have been discarded even prior to the time of mixing the cocaine with sugar—and probably by the thief himself.

[36] *Amicus* Burgess also argues (*Amicus* Br. 17–20) that, apart from the presumption, 26 U.S.C. 4704(a) violates petitioner's privilege against self-incrimination because of its role as part of a comprehensive narcotics control scheme. This, however, is not an issue embraced within the questions presented by the petition for certiorari in this case.

unconstitutional compulsion, but from the legitimate force of the government's case. A defendant faced with evidence justifying a rational inference of guilt is in a status no different from that of any other defendant who must make the difficult decision whether to testify in order to dispel—if he can—the weight of the government's evidence.

A. THE RATIONAL APPLICATION OF THE PRESUMPTIONS IN THIS CASE DID NOT IMPERMISSIBLY FETTER PETITIONER'S CHOICE AS TO WHETHER TO TESTIFY

As this Court recently pointed out in *Harrison* v. *United States,* 392 U.S. 219, 222:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

This is the established rule whether the government's case is based in part on an inference consonant with the experiences of every day life (see *Rugendorf* v. *United States,* 376 U.S. 528, 536–537) or whether its evidence otherwise is such that "the defendant remains quiet at his peril." *Holland* v. *United States,* 348 U.S. 121, 138–139.

The situation is no different in principle whether the basis for the inference or presumption is a rational statutory authorization or a judicially created rule of evidence. In either case, the trial judge has "the responsibility for safeguarding the integrity of

the jury trial" and the ultimate responsibility of deciding whether the government has made a submissible case. *United States* v. *Gainey, supra,* 380 U.S. at 68. We believe, therefore, that the dispositive answer to any argument herein based upon the self-incrimination clause remains that given in *Yee Hem* v. *United States, supra,* 268 U.S. at 185, as follows:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possesion, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Compare *Mobile, J.S.K.C. RR.* v. *Turnipseed,* 219 U.S. 35, 43; *Luria* v. *United States,* 231 U.S. 9, 25–26; *Rossi* v. *United States,* 289 U.S. 89, 91–92; *Morrison* v. *California,* 291 U.S. 82, 88–89, 90–91; *United States* v. *Fleischman,* 339 U.S. 349, 361–363; *Holland* v. *United States,* 348 U.S. 121, 138–139; *Rugendorf* v. *United*

States, 376 U.S. 528, 536–537. Nothing said in *Leary* invalidates or even questions this principle.[37]

Amicus Burgess argues, however, that petitioner could overcome the presumption of knowledge under 21 U.S.C. 174 only by acknowledging possession of the drug, and thereby subjecting himself to a state or federal prosecution on the basis of his admissions (*Amicus* Br. pp. 14–15). Petitioner could, however, have controverted the presumption in other ways, as by offering an alibi or testifying generally as to his lack of familiarity with all narcotic drugs.[38] But there is a more basic response. In every criminal case the defendant is free to admit any or all of the elements of the offense charged. If he should choose to admit all but one of the statutory elements, the statute would not thereby be rendered invalid because his defense might incriminate him under other state or federal laws. The fact that, if he chooses to testify, an accused may have to testify about "incriminating circumstances and events already in evidence" has never been considered to violate the privilege against self-incrimination. See *Johnson* v. *United States*, 318 U.S. 189, 196.

If the rule were otherwise, a defendant could bring almost any criminal prosecution to a halt by contending that if he testified in response to the government's

[37] The sole comment in *Leary* regarding *Yee Hem* was related to the Court's rejection in *Leary* of the comparative convenience test of rationality (see 395 U.S. at 44–45).

[38] Lack of knowledge of illegal importation is a defense to the prosecution. *United States* v. *Llanes*, 374 F. 2d 712 (C.A. 2); *United States* v. *Peeples*, 377 F. 2d 205 (C.A. 2).

case he might incriminate himself under other criminal statutes in some future criminal prosecution. The privilege against self-incrimination has never been given such broad effect. A criminal defendant's decision to take the stand involves a variety of risks, only one of which is that his testimony might be used against him in a subsequent criminal proceeding. One who testifies can be subjected to cross-examination, during the course of which he might make some damaging admissions. One who takes the stand can be impeached through the introduction of prior inconsistent statements. One who testifies can be shown to have perjured himself, or to have given testimony which conflicts with testimony given in other proceedings. If the existence of these risks could be the basis for thwarting a prosecution, our entire system of administering criminal justice would be severely threatened.

In contrast to *Leary* v. *United States,* 395 U.S. 6, *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62, or *Haynes* v. *United States,* 390 U.S. 85, the present case does not involve a statute which puts the defendant in the dilemma of either not registering thereunder and thus facing prosecution under the statute, or of registering, as the statute requires, and thereby subjecting himself "to a 'real and appreciable' risk of self-incrimination" under other statutes. See *Leary, supra,* 395 U.S. at 12–13; cf. *Garrity* v. *New Jersey,* 385 U.S. 493. Nor can the present case fairly be analogized to the situation where the defendant's testimony is compelled by the introduction of illegal evidence (*Harrison*

v. *United States,* 392 U.S. 219) or where he is compelled to relinquish one constitutional privilege in order to exercise another (*Simmons* v. *United States,* 390 U.S. 377). It is, instead, the force of the government's *lawful* case, under the statutes here at issue, which, puts the defendant to his choice of whether to testify.

Moreover, it is no more than speculation that petitioner would have risked subsequent prosecution under other statutes if he had come forward with evidence in this case. And even if such prosecution would have been attempted, any defenses he might have had thereto should not be available to defeat the instant prosecution, in which the "compulsion" to testify derived soley from the impact of the government's legitimate case. At the very most, the claim that there has been a violation of the privilege requires resolution only if there is such a subsequent prosecution and a defendant's testimony at the earlier trial is sought to be introduced against him. See *Simmons* v. *United States,* 390 U.S. 377, 389–394; *Harrison* v. *United States,* 392 U.S. 219; cf. *Gardner* v. *Broderick,* 392 U.S. 273, 278. That is not the situation here.

B. THE TRIAL COURT'S INSTRUCTIONS CONCERNING THE PRESUMPTIONS DID NOT CONSTITUTE ADVERSE COMMENT ON PETITIONER'S FAILURE TO TESTIFY OR IMPERMISSIBLY ABRIDGE HIS RIGHT TO REMAIN SILENT

Although petitioner did not except to the instructions [39] and did not request the court to instruct the

[39] He did call to the court's attention that it had stated at one point that cocaine rather than heroin was involved in the first count of the indictment (A. 22).

jury that no adverse inference should be drawn from his failure to testify (see *Bruno* v. *United States,* 308 U.S. 287), petitioner now contends that the statutory inferences of Sections 174 and 4704(a), when used in the instructions to the jury, constituted an adverse comment on his silence, and discouraged his right to remain silent. Substantially the same contention was, however, properly rejected by this Court in *United States* v. *Gainey, supra,* a case involving a similar statutory presumption.[40] With respect to the instructions given in *Gainey,* this Court held (380 U.S. at 70):

> The jury was * * * specifically told that the statutory inference was not conclusive. * * * In the absence of the statute, such an instruction to the jury [that the inference is authorized] would surely have been permissible. Cf. *Wilson* v. *United States,* [162 U.S. 613]. Furthermore, in the context of the instructions as a whole, we do not consider the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explain such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. Cf. *Bruno* v. *United States,* 308 U.S. 287. The judge's overall reference was carefully directed to the evidence as a whole with neither allusion nor innuendo based on the defendant's decision not to take the stand [footnote omitted].

[40] That is, 26 U.S.C. 5601(b)(2), which permits a jury to infer that a defendant is illegally carrying on the business of a distiller (26 U.S.C. 5601(a)(4)) by virtue of his unexplained presence at the site of the still.

Here, as in *Gainey,* the trial court specifically charged that "the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant" (A. 16). The court also told the jury it should return a guilty verdict only if it was convinced beyond a reasonable doubt of the defendant's guilt "in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court * * *" (A. 17). While it might have been better practice, as *Gainey* points out (380 U.S. at 71, n. 7), to omit from the charge any explicit reference to the statutory provisions authorizing the inferences, the instructions as given were adequate—especially in the absence of an exception.

Nor is *Gainey,* inconsistent with *Griffin* v. *California,* 380 U.S. 609, decided less than two months after *Gainey.* In *Griffin,* the trial court instructed the jury that, in determining guilt, it could consider the failure of petitioner to testify as to matters which he could reasonably be expected to deny or explain, and the prosecutor in his summation told the jury to consider this failure to testify as a basis for finding guilt. In reversing the conviction, this Court held that the prosecutor's comment and the court's statements constituted a "penalty imposed by courts for exercising a constitutional privilege" (380 U.S. at 614). Here, however, there was no adverse comment by any-

one concerning petitioner's failure to take the stand. Nor did the Court solemnize "the silence of the accused into evidence against him" (*ibid*). The jury was simply permitted, not directed, to draw rational inferences from the government's circumstantial case. Such instructions, as *Gainey* makes clear, do not constitute an impermissible comment on a defendant's failure to testify. See *Brown* v. *United States*, 370 F. 2d 874, 876 (C.A. 9), certiorari denied, 386 U.S. 1039.[41]

The reasons for rejecting petitioner's contentions based on the privilege against self-incrimination also apply to his claim, based on *United States* v. *Jackson*, 390 U.S. 570, that the instructions impermissibly discouraged his right to remain silent. Where, as here, inferences authorized by statute are rational, their tendency to induce an accused to testify is entirely proper—and does not differ from the effect of any other rational inference which is warranted by the government's evidence.

[41] *Bruno* v. *United States*, 308 U.S. 287, established that the jury can properly be instructed that a defendant has exercised his privilege not to testify and his silence cannot be used as evidence against him. Such an instruction can be given even in the absence of the defendant's request. See, *e.g.*, *Hanks* v. *United States*, 388 F. 2d 171, 175 (C.A. 10); *Bellard* v. *United States*, 356 F. 2d 437 (C.A. 5), certiorari denied, 385 U.S. 856.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed as to Counts One, Two and Four. We suggest, however, that the judgment should be reversed as to Count Three.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Assistant to the Solicitor General.

JEROME M. FEIT,
SIDNEY M. GLAZER,
Attorneys.

SEPTEMBER 1969.

APPENDIX

Thefts of Drugs For The Calendar Years 1959 Thru 1968 *

Year	Number of Thefts	Medical Opium	Morphine	Codeine	Dionin	Dilaudid	Cocaine	Demerol	Dolophine	Misc. Drugs	Total Drugs
1959	1,369	7,600	5,989	14,372	653	1,189	3,311	5,402	788	12,987	52,355
1960	1,570	6,506	5,831	17,851	815	705	3,397	7,955	1,288	12,728	57,079
1961	1,713	8,381	6,409	25,641	1,045	849	4,090	10,755	1,463	13,583	72,221
1962	1,620	6,745	6,478	22,633	1,067	946	3,035	11,628	1,420	11,363	65,319
1963	1,646	7,264	6,019	25,688	1,096	881	2,782	17,373	2,037	14,511	77,655
1964	1,791	9,617	6,727	29,982	1,187	983	3,957	14,520	1,974	15,854	84,805
1965	2,503	12,918	10,221	50,446	1,787	1,767	6,193	25,279	3,523	20,721	132,859
1966	2,417	9,865	8,582	42,142	1,475	1,899	4,352	22,948	4,152	16,455	111,875
1967	2,181	9,737	7,824	81,829	1,472	1,863	5,033	23,532	2,021	12,881	145,895
1968	2,268	9,982	8,956	63,236	2,760	1,611	5,469	26,330	2,357	15,255	135,962
To'al	19,078	88,710	73,040	373,824	13,361	12,367	41,623	165,727	21,029	146,342	936,028

* The figures in this table represent the total number of grams of each drug reported stolen.

U.S. GOVERNMENT PRINTING OFFICE: 1969